80-1113

Supreme Court, U. S.
FILED
DEC 26 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

JANUARY TERM, 1981

Case No.: _____

BYRON PETER ATHANASIOU and
PETER JAMES ELLIOTT

Petitioners,

—vs—

THE STATE OF NEW JERSEY

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF NEW JERSEY, APPELLATE DIVISION

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QUESTIONS PRESENTED

1. WERE THE PETITIONERS DENIED THEIR FUNDAMENTAL RIGHTS UNDER THE FOURTH AMENDMENT TO BE SECURE AGAINST UNREASONABLE SEARCHES AND SEIZURES WHEN THEY WERE STOPPED IN THEIR MOTOR VEHICLE BY A LAW ENFORCEMENT AGENT FOR A RANDOM VEHICLE CHECK WITHOUT PROBABLE CAUSE THAT ANY LAW WHATSOEVER WAS BEING VIOLATED.

2. SHOULD THIS COURT'S HOLDING IN DELAWARE V. PROUSE, 440 U.S. 648 (1979) BE TREATED AS ANNOUNCING A NEW VARIANT TO THE EXCLUSIONARY RULE OR AS A CLARIFICATION OF THE ALREADY EXISTING PARAMETERS OF THE EXCLUSIONARY RULE AS ANNOUNCED BY THIS COURT IN UNITED STATES V. MARTINEZ-FUERTE, 428 U.S. 543 (1976); UNITED STATES V. BRIGNONI-PONCE, 422 U.S. 873 (1975); TERRY V. OHIO, 392 U.S. 1 (1968).

3. SHOULD DELAWARE V. PROUSE BE APPLIED RETROACTIVELY TO CASES WHICH WERE PENDING BEFORE THE TRIAL COURT WHEN SAID OPINION WAS ANNOUNCED PRIOR TO ACTUAL TRIAL OF PETITIONERS AND WHEN PETITIONERS RAISED THE QUESTION OF THEIR FOURTH AMENDMENT RIGHTS AND THE PROUSE DECISION AT THE EARLIEST POSSIBLE OPPORTUNITY BY A MOTION TO SUPPRESS THE EVIDENCE.

IN THE

SUPREME COURT OF THE UNITED STATES

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CASE No.:

BYRON PETER ATHANASIOU and
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Petitioners,

—vs—

THE STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI
SUPERIOR COURT OF THE STATE OF
NEW JERSEY, APPELLATE DIVISION

Petitioners, Byron Peter Athanasiou and Peter James Elliott, seek to have this Court issue its Write of Certiorari to the Superior Court of New Jersey, Appellate Division, to review the decision of that Court affirming the conviction of Petitioners which occurred before the Superior Court of New Jersey — Law Division.

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1. The Petitioners were merely motorists who were not observed violating any law whatsoever but who were stopped nonetheless for a random vehicle check by the officer in question in violation of Petitioners' Fourth Amendment and Fourteenth Amendment rights.

2. Whether the principles announced in Delaware v Prouse by this Court were applicable to the to the Petitioners' case before the trial court or the Superior Court of New Jersey, Appellate Division.

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1. Decision of the Superior Court of New Jersey Appellate Division. A-1 to A-3
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CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT FOUR

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT FOURTEEN

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

A. HISTORY

The Petitioners were indicted on the 30th of May, 1979 in Passaic County, Indictment No. 580-79 and they were charged in two counts, the first count being possession of marijuana, and the second count being possession of marijuana with the intent to distribute marijuana. Subsequently, the Petitioners entered a plea of not guilty and filed a Motion to Suppress the physical evidence, the marijuana, which was taken from the motor vehicle which Petitioners were occupying when they were stopped for a random vehicle check. The trial court denied Petitioners' motion and an Order to this effect was entered.

On January 14, 1980, Petitioners entered retraxit pleas of guilty to Count Two in return for the dismissal of Count One; Petitioners further expressly reserved the right to appeal the

trial Court's denial of their Motion to Suppress. The trial court's denial of Petitioners' Motion to Suppress was appealed to the Superior Court of New Jersey, Appellate Division and said court affirmed the trial court's determination.

B. FACTS.

Petitioners were travelling on the Garden State Parkway, northbound in the City of Clifton, when they were stopped by New Jersey State Police Trooper William Bergen for a random vehicle check. Bergen stated that he did not stop the Petitioners with the intent to issue any traffic citations. No evidence was ever shown that would have indicated that the officer ever had an articulable and reasonable suspicion that Petitioners were unlicensed motorists or that the motor vehicle itself was either improperly registered or in need of a valid vehicle inspection sticker, or that he thought either of the Petitioners were subject to arrest for violation of the law.

After the officer stopped Petitioners' vehicle he instructed Petitioners to open the trunk of their vehicle, where he discovered the marijuana. At no time did either Petitioners give the officer permission to search the vehicle nor did the officer ever request said permission. The officer testified that during his five years as a State Trooper he had stopped numerous cars for travelling 50 m.p.h. in a 55 m.p.h. zone (such as Petitioners) and he has never obtained a search warrant in any case he has been involved in.

Although Officer Bergen stated that he obstensibly stopped Petitioners because their vehicles's tires appeared to be low, he further stated that he wanted their trunk opened because he assumed that he might find marijuana in it.

OPINION BELOW

The decision of the Superior Court of New Jersey, Appellate Division, which affirmed the trial court's denial of Petitioners' Motion to Suppress was by virtue of a non-published opinion

which is contained in the Appendix to this Petition at A.1-3. A timely Petition for Certification was filed in the Supreme Court of the State of New Jersey and said petition was denied on September 30th, 1980, published at N.J., A.2d (1980), a copy of which is contained in the Appendix to this Petition at A.4.

JURISDICTION

The judgment of the Superior Court of New Jersey, Appellate Division, was entered on the 1st day of July, 1980. A timely Petition for Certification was filed before the Supreme Court of the State of New Jersey, and, was denied on the 30th day of September, 1980. The jurisdiction of this Court to review the decision of the Superior Court of New Jersey, Appellate Division is invoked pursuant to Title 28 U.S.C. § 1257(3).

QUESTION PRESENTED

1. WERE THE PETITIONERS DENIED THEIR FUNDAMENTAL RIGHTS UNDER THE FOURTH AMENDMENT TO BE SECURE AGAINST UNREASONABLE SEARCHES AND SEIZURES WHEN THEY WERE STOPPED IN THEIR MOTOR VEHICLE BY A LAW ENFORCEMENT AGENT FOR A RANDOM VEHICLE CHECK WITHOUT PROBABLE CAUSE THAT ANY LAW WHATSOEVER WAS BEING VIOLATED.

2. SHOULD THIS COURT'S HOLDING IN ***DELAWARE V PROUSE***, 440 U.S. 648 (1979) BE TREATED AS ANNOUNCING A NEW VARIANT TO THE EXCLUSIONARY RULE OR AS A CLARIFICATION OF THE ALREADY EXISTING PARAMETERS OF THE EXCLU-

SIONARY RULE AS ANNOUNCED BY THIS COURT IN UNITED STATES V. MARTINEZ-FUERTE, 428 U.S. 543 (1976); UNITED STATES V. BRIGNONI-PONCE, 422 U.S. 873 (1975); TERRY V. OHIO, 392 U.S. 1 (1968).

3. SHOULD DELAWARE V. PROUSE BE APPLIED RETROACTIVELY TO CASES WHICH WERE PENDING BEFORE THE TRIAL COURT WHEN SAID OPINION WAS ANNOUNCED PRIOR TO ACTUAL TRIAL OF PETITIONERS AND WHEN PETITIONERS RAISED THE QUESTION OF THEIR FOURTH AMENDMENT RIGHTS AND THE PROUSE DECISION AT THE EARLIEST POSSIBLE OPPORTUNITY BY A MOTION TO SUPPRESS THE EVIDENCE.

The trial court denied Petitioners' Motion to Suppress the physical evidence and Petitioners changed their plea to guilty on possession of marijuana with an expression reservation reserving their right to appeal the trial court's denial of their Motion to Suppress. Appeal to the Superior Court of New Jersey, Appellate Division and affirmance of the trial court's ruling followed.

REASONS FOR GRANTING THE WRIT

1. The Petitioners were merely motorists who were not observed violating any law whatsoever but who were stopped nonetheless for a random vehicle check by the officer in question in violation of Petitioners' Fourth Amendment and Fourteenth Amendment rights.

The trial court and the lower Appellate Court affirmatively found that Petitioners did not have the right to raise their Fourth Amendment challenge to the search of their vehicle from which the contraband was seized. Petitioners' Fourth

Amendment challenge was cast aside by the Superior Court of New Jersey, Appellate Division, where it held that;

> "The charges arose out of Trooper Bergen's stop of defendants' motor vehicle on the Garden State Parkway on February 24, 1979, prior to the decision in *Delaware v. Prouse*, 440 *U.S.* 648, 99 *S.Ct.* 1391, 59 L.Ed 2d 660 (1979). Since our Supreme Court has held that the *Delaware v. Prouse* rule should be applied prospectively only, *State v. Carpentieri*, N.J. (Docket No. A-122-79, decided May 19, 1978), we need not consider the first issue raised by defendant, namely, whether the stop in question was a "random stop" prescribed by *Delaware v. Prouse,"* (A.2).

Simply stated, the State Appellate Court ruled that the Petitioners had no right to enforce their Fourth Amendment rights against unreasonable searches and seizures because the incident in question occurred prior to this Court's ruling in ***Delaware v. Prouse***.

This decision by the New Jersey Appellate Court, sought to be reviewed, has failed to take into consideration all of the additional case law presented to it and is in direct and patent conflict with this Court's decision in ***United States v. Martinez-Fuerte***, 428 U.S. 543 (1976); ***United States v. Brignoni-Ponce***, 422 ***U.S.*** 873 (1975); ***Terry v. Ohio***, 392 U.S. 1 (1968); ***Brinegar v. United States***, 388 U.S. 160 (1949); and, ***United States v. DiRe***, 332 U.S. 581 (1948). In the ***Brinegar*** case, this Court stated that:

> . . .the citizen who has given no good cause for believing he is engaged in that sort of activity (transporting contraband) is entitled to proceed on his way without interference. But one who recently and repeatedly has given substantial ground for believing that he is engaged in the forbidden transportation in the area of his usual operations has no such immunity, if the officer who intercepts him in that region knows that fact at the time he makes the interception and the circumstances under which it is made are not such as to indicate the suspect is going about legitimate affairs.

> This does not mean, as seems to be assumed, that every traveler along the public highways may be stopped and searched at the officers' whim, caprice or mere suspicion. (at page 1311).

The Petitioners were travelers from the State of Florida, the officer had no good cause for believing they were transporting contraband and the officer who stopped the Petitioners had no way to know at the time he stopped the Petitioners that they were not going about their legitimate affairs. The officer herein stopped the Petitioners' vehicle based only upon his whim, caprice or mere suspicion. It is intolerable and unreasonable to condone a law enforcement officer's stopping of automobiles on the mere chance of finding contraband and subjecting persons who are lawfully using the highways to the indignity of such a search in violation of the Fourth Amendment. This action was hardly a "good faith" effort by a police officer; rather it was an intentional abuse of power based on a pretext in a knowing attempt to circumvent the petitioners constitutional rights.

It has been held in the case of ***United States v. Morrison***, 546 F.2d 319 (9th Cir. 1976), that:

> When a law enforcement officer signals a motorist to stop by use of a siren or red light, there has been a seizure which must be justified under the Fourth Amendment. *United States v. Ward*, 448 F.2d 162 (9th Cir. 1973) (In banc); *Carpenter v. Sigter*, 419 F.2d 169 (8th Cir. 1969). The seizure occurs when the officer first communicates the command to halt. The command must be valid when given; . . .*United States v. DiRe*, 332 U.S. 581, 595, 68 S.Ct. 222, 92 L.Ed 210 (1948).

The Petitioners were driving a three year old vehicle and were proceeding at fifty miles per hour in a fifty-five miles per hour speed zone. This officer said the car was riding low and that the tires appeared to be in need of further inflation. These were the factors given by the Officer to justify his seizure of the Petitioners, their vehicle and his subsequent search. The

officer had no basis at all upon which to have a reasonable suspicion that illegal activity was afoot; there was no idicia of illegal activity present and thus the stopping of Petitioners constituted an illegal, unconstitutional seizure under the Fourth and Fourteenth Amendments to the Constitution of the United States. ***United States v. Brignoni-Ponce***, 442 U.S. 873 (1975).

The seizure and resultant search made by Officer Bergen was violative of the Fourth and Fourteenth Amendments and the decisions of this Court and the Circuit Courts. On this basis and on the foregoing argument Petitioners maintain that review of the Superior Court of New Jersey, Appellate Division's decision is mandated and a reversal is required.

2. Whether the principles announced in ***Delaware v. Prouse*** by this Court was applicable to the Petitioners' case before the trial court or the Superior Court of New Jersey. Appeallate Division.

This Court held in ***Delaware v. Prouse***, 440 U.S. 648 (1979), that a random stop of a motorist is per se unreasonable under the Fourth and Fourteenth Amendments to the United States Constitution. In that case the arresting officer stopped the vehicle although he had not seen anything suspicious. The officer walked toward the vehicle, smelled marijuana and found marijuana on the floor of the vehicle as he was checking documentation. In upholding the Delaware Court's decision this Court stated that:

> Stopping an automobile and detaining its occupants constitute a "seizure" within the meaning of the Fourth and Fourteenth amendments, even though the purpose of the stop is limited and the resulting detention is quite brief.

This Court further held that unless there is a reasonable suspicion of a violation of law, a police officer may not stop and/or detain a motor vehicle and its occupants; that the motoring public,

> . . .may not. . .have their travel and privacy interfered with at the unbridled discretion of police officers.

In the instant case the arresting officer admitted responding before the trial court that Appellants had not violated the law at the time the vehicle was pulled over. He stopped the Appellants and actively engaged in looking for possible violations of the law; he was not merely attempting to verify the driver's license and the vehicle's registration. This type of indiscriminate probing into the motoring public's right to travel in privacy without fear of unreasonable, unwarranted and intolerable searches and seizures cannot be tolerated regardless of the outcome of any search initiated by the unbridled and groundless discretion of police officers. The meager circumstances testified to by the arresting officer are so uncertain and indifinite that they fail to constitute lawful circumstantial evidence. Compare: ***United States v. Diaz***, 515 F.2d 892 (5th Cir. 1975), cert den., 423 U.S. 1052.

On this basis the Petitioners maintain that review of the Superior Court of New Jersey, Appellate Division's decision is mandated and a reversal is required.

CONCLUSION

WHEREFORE, in light of the foregoing circumstances and authorities cited therein, the Petitioners respectfully request the judgment of the Superior Court of New Jersey, Appellant Division be reversed and this Court issue a Petition for Writ of Certiorari.

Respectfully submitted,

by: Maurice Graham

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Certify to: State of New Jersey LORANE L. POSNER, Deputy Att'y
PO Box CN 24 Princeton, New Jersey 08540
Honorable Wade H. McCree, Jr., Solicitor General,
Department of Justice, Washington, D.C. 20530. this Dec 26, 1

By: Maurice Graham

APPENDIX

1. Decision of the Superior Court of New Jersey, Appellate Division A-1 to A-3.

2. Decision of the Supreme Court of New Jersey. A-4.

NOT FOR PUBLICATION WITHOUT THE APPROVAL
OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2227-79-A

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

BYRON PETER ATHANASIOU and
PETER JAMES ELLIOTT,

Defendants-Appellants.

Submitted July 1, 1980--Decided JUL 14 1980

Before Judges Botter and Morgan.

On appeal from Superior Court, Law Division,
Passaic County.

Stern, Lavinthal & Ackerman, attorneys for appellants
(Alan R. Ackerman, of counsel and on the brief).

John J. Degnan, Attorney General, attorney for respondent
(Lorane L. Posner, Deputy Attorney General, of counsel and
on the brief).

PER CURIAM

The sole issue on this appeal is whether Trooper Bergen made a valid warrantless search of the trunk of defendant's vehicle in which 360 pounds of marijuana were found. Defendants' motion to suppress the evidence was denied, and defendants entered guilty pleas to the second count of the indictment which charged possession with intent to distribute a controlled dangerous substance contrary to N.J.S.A. 24:21-19(a)(1). Each defendant was sentenced to State Prison for a term of two to three years and each was fined $10,000. This appeal followed.

The charges arose out of Trooper Bergen's stop of defendants' motor vehicle on the Garden State Parkway on February 24, 1979, prior to the decision in Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed. 2d 660 (1979). Since our Supreme Court has held that the Delaware v. Prouse rule should be applied prospectively only, State v. Carpentieri, ___ N.J. ___ (Docket No. A-122-79, decided May 19, 1980), we need not consider the first issue raised by defendant, namely, whether the stop in question was a "random stop" proscribed by Delaware v. Prouse.

On the evidence presented the trial judge found that the search of the trunk was based on probable cause obtained when the police officer detected a strong odor of marijuana emanating from the passenger compartment of the vehicle and also observed various marijuana seeds on the floor of the vehicle. The trial judge also found as a fact that the driver consented to the search of the trunk after being advised that he did not have to give his consent. On the evidence presented, the trial judge could properly make these findings, and we must accept them as having support by credible evidence. State v. Johnson, 42 N.J. 146, 162 (1964).

The search of the trunk having been made with the consent of the vehicle's driver in keeping with the requirements of State v. Johnson, 68 N.J. 349, 353-354 (1975), the trial judge properly denied the motion to suppress evidence. Although this conclusion makes it unnecessary to decide the issue concerning probable cause raised by defendants, it would appear that the trial judge's finding of probable cause is not inconsistent with State v. Patino, ___ N.J. ___ (Docket No. A-17-79, decided May 19, 1980) aff'g

163 N.J.Super. 116 (App.Div. 1978). See State v. Kahlon, 172 N.J.Super. 331, 338 (App.Div.1980).

Affirmed.

A TRUE COPY

Elizabeth M. McLaughlin

Clerk

SUPREME COURT OF NEW JERSEY
C-79 SEPTEMBER TERM 1980

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

BRYON PETER ATHANASIOU & PETER JAMES ELLIOTT,

Defendants-Petitioners.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-2227-78 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 30th day of September, 1980.

Clerk

dp

FILED
SUPREME COURT
OCT 8 1980

Clerk

A TRUE COPY

NO. 80-1113

IN THE

Supreme Court of the United States

JANUARY TERM 1981

BYRON PETER ATHANASIOU and
PETER JAMES ELLIOTT,
Petitioners,

vs.

STATE OF NEW JERSEY,
Respondent.

On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION

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Questions Presented

The questions presented by the instant petition involve the impact and applicability of this Court's recent decision in *Delaware* v. *Prouse,* 440 U.S. 648 (1979). The questions specifically presented are:

(1) Is the prohibition against random motor vehicle stops enunciated in *Prouse* applicable in situations where a vehicle is halted for articulable reasons in order to inspect its physical condition and safety?

(2) Assuming that a random stop is involved, is the decision of the New Jersey Supreme Court in *State* v. *Carpentieri,* 82 N.J. 546, 414 A.2d 966 (1980), according prospective effect only to the *Prouse* decision in conformity with other decisions of this Court affording prospective application only to Fourth Amendment decisions, especially where *Prouse* invalidated random automobile stops, heretofore sanctioned in New Jersey by the decisions rendered in *State* v. *Gray,* 59 N.J. 563, 567, 285 A.2d 1, 5 (1971); *State* v. *Marchitto,* 132 N.J. Super. 511, 514; 334 A.2d 354, 357 (App. Div. 1974), certif. den. 68 N.J. 163, 343 A.2d 450 (1975); *State* v. *Gammons,* 113 N.J. Super. 434, 437, 274 A.2d 69, 72 (App. Div. 1971), aff'd o.b. 59 N.J. 451, 283 A.2d 897 (1971); *State* v. *Braxton,* 111 N.J. Super. 191, 196, 268 A.2d 40, 45 (App. Div. 1970); rev'd on other grounds 57 N.J. 286, 271 A.2d 713 (1970); *State* v. *Kabayama,* 98 N.J. Super. 85, 88; 236 A.2d 164, 167 (App. Div. 1967); aff'd o.b. 52 N.J. 507; 246 A.2d 714 (1968); *Blanchard* v. *Town of Kearny,* 145 N.J. Super. 246, 248; 367 A.2d 464, 468 (Law Div. 1976), aff'd o.b. 153 N.J. Super. 158, 379 A.2d 288 (App. Div. 1977)?

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NO. 80-1113

IN THE

Supreme Court of the United States

JANUARY TERM 1981

BYRON PETER ATHANASIOU and
PETER JAMES ELLIOTT,
Petitioners,

vs.

STATE OF NEW JERSEY,
Respondent.

On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION

Opinions Below

The order of the Supreme Court of New Jersey denying petitioner's petition for certification to the Superior Court of New Jersey Appellate Division, —— N.J. ——, —— A.2d —— (1980), is appended to petitioner's Petition for Certiorari as Appendix A-4. The unreported opinion of the Superior Court of New Jersey, Appellate Division is appended to the Petition as Appendix A-1 to A-3. The Su-

perior Court of New Jersey, Law Division, Passaic County, did not issue a written opinion; its oral ruling denying petitioner's motion to suppress evidence appears in the transcript of November 20, 1979, at page 19.

United States Constitution, Article VI, Clause 2.

> This Constitution, and the Laws of the United States which shall be made in pursuant thereof; and all Treaties made, or which shall be made, under authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding.

United States Constitution, Amendment IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Supreme Court Rule 17.

> Considerations Govering Review of Certiorari
>
> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

(2) The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

Constitution of the State of New Jersey, Article 1, Paragraph 7.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, except upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

N.J. Stat. Ann. 24:21-19 (West)

Prohibited acts.

A. Manufacturing, distributing, dispensing—Penalties

a. Except as authorized by this act, it shall be unlawful for any person knowingly or intentionally:

(1) To manufacture, distribute, or dispense, or to possess or have under his control with intent to manufacture, distribute, or dispense a controlled dangerous substance; or

* * *

b. Any person who violates subsection a. with respect to:

* * *

(2) A substance, in a quantity of one ounce or more including any adulterants or dilutants, classified in Schedules I or II which is a narcotic drug, provided that there are included at least 3.5 grams of the pure free base Schedule I or II narcotic drug, is guilty of a high misdemeanor and shall be punished by imprisonment for up to life, a fine of not more than $25,000.00, or both; or

* * *

N.J. Stat. Ann. 24:21-20 (West)

Prohibited acts.

B. Possession, use or being under influence—Penalties.

a. It is unlawful for any person, knowingly or intentionally, to obtain, or to possess, actually or constructively, a controlled dangerous substance unless

such substance was obtained directly, or pursuant to a valid prescription or order from a practioner, while acting in the course of his professional practice, or except as otherwise authorized by this act. Any person who violates this section with respect to:

* * *

(2) A substance, in a quantity of 1 ounce or more including any adulterants or dilutants, classified in Schedule I or II which is a narcotic drug, provided that there are included at least 3.5 grams of the pure free base Schedule I or II narcotic drug, is guilty of a high misdemeanor and shall be punished by imprisonment for not more than 7 years, a fine of no more than $15,000.00, or both;

* * *

N.J.S.A. 39:4-56

Delaying Traffic Prohibited.

No person should drive or conduct a vehicle in such condition, so constructed or so loaded as to be likely to cause delay in traffic or accident to man, beasts or property.

Statement of the Case

On February 24, 1979, at approximately 3:00 p.m., State Trooper William Bergen of the New Jersey State Police observed a 1976 white Cadillac automobile with Florida license plates travelling northbound on the Garden State Parkway in the center lane at a noticeably slow rate of speed of 50 miles per hour. Bergen further observed that the rear of the vehicle was extremely low to the ground and that both rear tires appeared to be going flat. Fear-

ful of the potential safety hazards resulting therefrom, Bergen signalled for the vehicle to pull over to the side of the road. Petitioner Anthanasiou was the operator of the vehicle. Upon request he produced a valid driver's license and identification credentials for the vehicle. During this time Petitioner Elliott was apparently asleep in the rear seat of the vehicle. Bergen peered inside the vehicle to ascertain whether there were weapons secreted in the vehicle. Immediately he detected a strong odor of raw marijuana emanating from the rear of the vehicle. Upon closer examination, Bergen further observed numerous marijuana seeds on the floor of the vehicle. Bergen was able to identify the odor of raw marijuana due to his extensive background in narcotics investigations.

Due to the strong odor of marijuana emanating from the vehicle, the extremely low position of the trunk and the fact that petitioners were travelling from Florida, Bergen inquired as to what substance was weighing down the trunk of the vehicle. Petitioner Anthanasiou appeared extremely nervous and agitated. Bergen then requested that Anthanasiou open the trunk of the vehicle. Bergen informed Anthanasiou, however, that he did not have to comply with the request. Nevertheless, Anthanasiou voluntarily proceeded to open the trunk of his vehicle. Contained therein, in plain view, were numerous bales encased in clear plastic and sealed with masking tape. Through the clear plastic, the 360 pounds of raw marijuana were readily visible.

Petitioners were indicted for possession of marijuana in violation of N.J.S.A. 24:21-20(a)(2) (count one) and possession of marijuana with intent to distribute in violation of N.J.S.A. 24:21-19(a)(1) (count two). Prior to trial, petitioners moved to suppress the marijuana seized from their automobile. An evidentiary hearing was conducted on November 20, 1979, at the conclusion of which the Honor-

able William Marchese, Judge, Superior Court, denied petitioners' motions to suppress. On January 14, 1980 petitioners entered a negotiated *retraxit* plea of guilty to Count Two of the indictment in return for the dismissal of Count One. On February 22, 1980, both defendants were sentenced to terms of two to three years in State Prison.

Petitioners appealed the denial of their suppression motions to the Superior Court of New Jersey, Appellate Division. On July 14, 1980 the Court affirmed the judgment below in an unreported written opinion. (Petitioner's Appendix A-1 to A-3). On September 30, 1980 petitioners' petition for certification was denied by the New Jersey Supreme Court. (Petitioners' Appendix A-4). The instant petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division, follows.

Summary of Argument

Delaware v. *Prouse,* 440 U.S. 648 (1979) proscribes random motor vehicle stops heretofore permitted in New Jersey by statutory as well as case law. The facts of record do not implicate the proscription of the *Prouse* doctrine at all. Even assuming the implication of the *Prouse* doctrine, however, there is in general, no constitutional right to retroactive application of exclusionary rule doctrines. Since *Delaware* v. *Prouse, supra,* represents major changes for New Jersey law enforcement personnel and the courts, the opinion should be given only prospective application. Moreover, great deference should be accorded to the judgment of the New Jersey Supreme Court which passed upon this very question and afforded prospective only application to *Prouse* in *State* v. *Carpentieri,* 82 N.J. 546, 414 A.2d 966 (1980).

ARGUMENT

POINT I

The principles of the *Delaware* v. *Prouse* are not applicable to the instant factual situation.

Petitioners contend that insufficient probable cause existed to jusify the initial stop of their vehicle. This argument, however, belies the proofs adduced at the motion to suppress.

As observed in the statement of the case *ante,* and as established during the suppression proceedings, the articulable suspicion of a safety hazard existed to mandate the stop. As was established during the suppression proceedings, the stop of petitioner's vehicle was not at all random, but was precipitated by its weighted down appearance and slow rate of speed in the center lane of a major highway. Respondent would suggest that the lowered rear end was symptomatic of poor suspension, faulty shock absorbers, underinflated tires, or any other of a number of conditions which may have made the vehicle potentially hazardous. Accordingly, it was inarguably Trooper Bergen's duty to direct petitioners' vehicle to the side of the road for inspection. See N.J.S.A. 39:4-56 which prohibits the driving of a vehicle in such a condition as is likely to delay the flow of traffic or cause an accident. And see, *State* v. *Hock,* 54 N.J. 526, 533 (1969), 257 A.2d 699, *cert.* den. 399 U.S. 930 (1970), wherein the Supreme Court of New Jersey approved the procedure of ordering a vehicle believed to be in violation of the Motor Vehicles Act to the curb and requesting the motorist's driver's license and vehicle registration.

Although the *Delaware* v. *Prouse,* 440 U.S. 648 (1979) decision nullifies the random motor vehicle procedure here-

tofore sanctioned in this State, it in no way undermines the general police authority to enforce traffic and vehicular statutes and regulations. Indeed, this Court's concern for the effective maintenance and enforcement of such motoring requirements find repeated expression in the text of the *Prouse* opinion. Its proscription, as previously noted, encompasses only the totally random stop.

In view of the foregoing, Respondent respectfully submits that *Prouse* has no application to the situation at bar. The stop of the vehicle herein was not random but was based on legitimate articulable factors.

POINT II

The petition does not present a substantial question because this Court's prior decisions indicate that *Delaware* v. *Prouse* should be applied prospectively only, and thus not to the instant matter.

Petitioners contend that the courts of the State of New Jersey have violated their constitutional right to be free of unreasonable searches and seizures by refusing to apply the decision in *Delaware* v. *Prouse,* 440 U.S. 648 (1979) retroactively. The instant stop occurred on February 24, 1979. On March 20, 1979 *Delaware* v. *Prouse, supra* was decided by the Court.

At the outset, Respondent would note that this court has recently denied a petition for certiorari submitted by a New Jersey petitioner, to raise the precise issue raised herein in *Stevens* v. *New Jersey,* —— U.S. ——, 28 Cr.L. 4062 (Docket No. 80-135, *cert.* den. November 3, 1980).

It should be remembered that criminal defendants do not have a constitutional right to have evidence suppressed.

See, *Stone* v. *Powell,* 428 U.S. 465, 486-487 (1976); *United States* v. *Peltier,* 422 U.S. 531, 535-537 (1975); *Desist* v. *United States,* 394 U.S. 244, 250 (1969). Rather, they have the right to be free from unreasonable searches and seizures. Although of constitutional origin [*Mapp* v. *Ohio* 367 US 643, 649-654 (1961)] the exclusionary rule is merely a "procedural weapon" for the enforcement of constitutional rights. *Desist* v. *United States, supra* at 250; *Linkletter* v. *Walker,* 381 U.S. 618, 638 (1965). Therefore, this Court in *Linkletter* specifically declined to give retroactive effect to its earlier decision in *Mapp* v. *Ohio, supra.*

There is no *per se* constitutional violation inherent in refusing to grant retroactive effect to new exclusionary rule doctrines. Indeed, in *Linkletter,* this Court unequivocally stated that "the Constitution neither prohibits nor requires retrospective effect. As Justice Cardozo said, 'We think the Federal Constitution has no voice on the subject.'" 381 U.S. at 629 (citing *Great Northern Ry Co.* v. *Sunburst Oil & Refining Co.,* 287 U.S. 358, 364 (1932). Moreover, this Court has been extremely reluctant to give retroactive effect to constitutional rules which do not impact on the truth finding process. *Gosa* v. *Mayden,* 413 U.S. 665 (1975). In *United States* v. *Peltier, supra,* this Court found that the exclusion of evidence obtained in violation of Fourth Amendment guarantees came within this classification. 442 U.S. at 534-537. See also *Brown* v. *United States,* 422 U.S. 916 (1975).

Respondent emphasizes that *Prouse, supra,* has no application to the case currently under review. (See Point I, *ante*). However, should this Court view the instant matter as an appropriate vehicle to decide the retroactivity of *Prouse, supra,* we offer the following observations. The application of new extensions of the exclusionary rule has been expressly rejected by this Court. See, *e.g., Williams*

v. *United States,* 401 U.S. 646 (1970) and *Desist* v. *United States, supra.* Any conceivable doubt as to the Court's position on this issue was totally removed in *United States* v. *Peltier, supra,* wherein the condemnation of roving border patrol searches expressed in *Almeida-Sanchez* v. *United States,* 413 U.S. 266 (1973), was accorded no effect in the subsequent *Peltier* case. This Court prefaced its determination thusly:

> Since 1965 this Court has repeatedly struggled with the question of whether rulings in criminal cases should be given retroactive effect. In those cases where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials . . . the doctrine has quite often been applied retroactively. It is indisputable, however, that in every case in which the Court has addressed the retroactivity problem in the context of the exclusionary rule, whereby concededly relevant evidence is excluded in order to enforce a constitutional guarantee that does not relate to the integrity of the factfinding process, the Court has concluded that any such new constitutional principles would be accorded only prospective application. *United States* v. *Peltier, supra* at 535; (emphasis supplied; citations and footnote omitted).

Respondent believes that utilization of the proper standards and, more importantly, appreciation of the fundamental purpose of the exclusionary rule clearly militate in favor of prospective only application of the *Prouse* decision. In *Stovall* v. *Denno,* 388 U.S. 293 (1967), this Court declared that the tests to be used in determining whether to grant retroactive application to constitutional rules are:

> (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standard.

Id. at 297. See *Johnson* v. *New Jersey,* 384 U.S. 719, 728 (1960).

When these criteria are applied to *Prouse* it becomes evident that only prospective application should be given this opinion. The purposes of the exclusionary rule can in no way be advanced by giving retroactive application to new decisions in the law of search and seizure. If the police gain evidence in a manner which they have reason to believe is acceptable and that evidence is suppressed due to a later change or clarification of the law in that area the only benefit will be to the criminal who is set free even though there is no doubt as to his guilt. Our society cannot gain since there could not possibly be any deterrent effect in such application of the exclusionary rule. The exclusionary rule and the rules set forth in *Prouse* cannot be advanced by retroactive application. See, *Brown* v. *Louisiana,* —— U.S. ——, 100 S.Ct. 2214, 2219 (1980); *United States* v. *Peltier, supra* at 538-539; *State* v. *Carpentieri,* 82 N.J. 546, 414 A.2d 966 (1980); *State* v. *Patino,* 80 N.J. 1, 5 n.2, 401 A.2d 1094, 1095 (1980); *State* v. *Howery,* 80 N.J. 563, 569, 401 A.2d at 635 (1979).

With regard to the second factor, it is clear that in New Jersey, police officers relied substantially on statutory as well as case law. The halt preceding the search and seizure in the case at bar occurred on February 24, 1979, approximately one month prior to the Supreme Court's invalidation of random stops in *Prouse.* At the time of the instant stop, however, random stops for routine license and

registration checks were in all respects proper and specifically sanctioned by both statute and decisional law in this State. N.J.S.A. 39:3-29. See also *State* v. *Gray,* 59 N.J. 563, 567, 285 A.2d 1, 5 (1971); *State* v. *Marchitto,* 132 N.J. Super. 511, 514; 334 A.2d 354, 357 (App. Div. 1974), certif. den. 68 N.J. 163, 343 A.2d 450 (1975); *State* v. *Gammons,* 113 N.J. Super. 434, 437; 274 A.2d 69, 72 (App. Div. 1971), aff'd o.b. 59 N.J. 451; 283 A.2d 897 (1971); *State* v. *Braxton,* 111 N.J. Super. 191, 196; 268 A.2d 40, 45 (App. Div. 1970), rev'd on other grounds 57 N.J. 286, 271 A.2d 713 (1970); *State* v. *Kabayana,* 98 N.J. Super. 85, 88; 236 A.2d 164, 167 (App. Div. 1967), aff'd o.b. 52 N.J. 507; 246 A.2d 714 (1968); *Blanchard* v. *Town of Kearny,* 145 N.J. Super. 246, 248; 367 A.2d 464, 468 (Law Div. 1976), aff'd o.b. 153 N.J. Super. 158; 379 A.2d 288 (App. Div. 1977). Prior to the decision in *Prouse* there was no reason to believe that license and registration inspections were violative of the Fourth Amendment. Indeed, this Court in *Arkansas* v. *Sanders,* 442 U.S. 753 (1979), recognized that both courts and law enforcement officers have often found difficulty in applying previous Fourth Amendment decisions to individual cases. To hold police officers to a standard which the Supreme Court of the United States has found the courts unable to meet would be unreasonable.

Moreover, there can be little doubt that retroactive application of *Prouse* would place a significant burden on the administration of justice. The New Jersey Supreme Court in *State* v. *Carpentieri, supra,* affirmed State appellate courts in *State* v. *Kahlon,* 172 N.J. Super. 331, 411 A.2d 1178, (App. Div. 1980) and *State* v. *Mann,* 171 N.J. Super. 173, 408 A.2d 440, (App. Div. 1979), to hold that *Delaware* v. *Prouse, supra,* would have prospective effect only in New Jersey. To reach this result, the *Carpentieri* Court relied upon this Court's opinion in *United States* v. *Peltier, supra,* and affirmed its own decision in *State* v. *How-*

ery, supra and *State* v. *Nash,* 64 N.J. 464, 317 A.2d 689 (1974).

Based on the foregoing it is clear that *Delaware* v. *Prouse, supra,* has no application to the case at bar. The factual circumstances do not implicate the proscription against random stops, but in any event the decision should not be afforded retroactive application.

CONCLUSION

For the reasons set forth herein, it is respectfully urged that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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